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No. 07-1216

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal constitutional claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may instead hold the federal claim forfeited by interposing a state-law procedural rule in a way that serves no legitimate state interest and is neither firmly established nor regularly followed.

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as *amicus curiae* in this case when it was before this Court previously, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), and again at the certiorari stage urging review. *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (2008).

WLF's Legal Studies Division has also published on the topic of punitive damages. *See, e.g.,* Arvin Maskin & Peter A. Antonucci, *Punitive Damages Primer: Legal Principles And Constitutional Challenges* (WLF Monograph, 1994);

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

Theodore B. Olson & Thomas H. Dupree, Jr., *Supreme Court Revisits Constitutional Limits On Punitive Damages* (WLF Legal Opinion Letter, Oct. 20, 2006); Evan M. Tager, *Philip Morris USA v. Williams: Another Brick In The Punitive Damages Wall* (WLF Legal Backgrounder, March 9, 2007).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy and has appeared as co-*amicus curiae* with WLF in this case and in other punitive damages cases in this Court. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996).

WLF and AEF believe that this Court must act in this case to ensure that lower courts are not allowed to pick and choose which of this Court's decisions they will follow. To allow lower courts to act in such a manner would risk undermining important constitutional protections this Court has afforded parties, especially where state courts argue that independent state law grounds prevent review of federal issues. This result would not serve the interests of justice and finality.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

In its prior decision in this case, this Court held that the Oregon Supreme Court had "applied the wrong constitutional standard" when it held that a jury could impose punitive damages on a defendant for potential injuries to non-parties. *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1065 (2007). The Court remanded the case to the Oregon Supreme Court, instructing it to reconsider Philip Morris's due process argument against the backdrop of the correct constitutional standard—that juries are *not allowed* to punish defendants for potential harm to non-parties arising out of the same conduct at issue in the case before them. *Id.* Rather than comply with this Court's instructions, however, the Oregon Supreme Court instead applied a novel state law procedural rule, and reaffirmed its prior opinion without addressing the due process violations found by this Court. *Williams v. Philip Morris USA*, 176 P.3d 1255, 1263-64 (Or. 2008) (*Williams III*).

This reaffirmance was based on the Oregon Supreme Court's belated finding that the jury instruction proposed by Philip Morris included errors of state law—errors that were wholly unrelated to the constitutional issue previously decided by this Court. *Id.* Because the Oregon Supreme Court's decision disregarded this Court's mandate, and, in the process, denied Philip Morris the due process rights that this Court held must be enforced on remand, this Court should reverse the

punitive damages award against Philip Morris and direct the Oregon Supreme Court to order a new trial. This action is necessary to make clear to lower courts that they cannot pick and choose when to follow a directive from this Court.

This case arises out of the death of Jesse Williams from lung cancer, which was attributed to smoking. Mr. Williams's widow sued Philip Morris for negligence and deceit related to its cigarette marketing practices. Following trial, the jury found Philip Morris liable and awarded $821,000 in compensatory damages—which the trial court reduced to $521,485 pursuant to Oregon's statutory cap—and $79.5 million in punitive damages. The trial court held that the punitive damages award was unconstitutionally "excessive" under this Court's holding in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and reduced the award to $32 million. Both sides appealed, and the Oregon Court of Appeals reinstated the $79.5 million punitive damages award. The Oregon Supreme Court denied review, but this Court granted *certiorari*, vacated the decision, and remanded the case to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA v. Williams*, 540 U.S. 801 (2003).

On remand, the Oregon Court of Appeals affirmed its prior opinion finding that the $79.5 million punitive damages award was not

unconstitutionally excessive. *Williams v. Philip Morris USA*, 92 P.3d 126 (Or. Ct. App. 2004) (*Williams I*). The Court of Appeals rejected Philip Morris's argument that the trial court erred in failing to instruct the jury that it could not award punitive damages in order to punish Philip Morris for harm to non-parties. *Id.* at 142 ("[W]e are not persuaded by defendant's argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others."). The Oregon Court of Appeals never raised, or even hinted at, the possibility that Philip Morris had failed to preserve its right to continue to argue that the jury instructions given by the trial court violated its due process rights. Rather, the Oregon Court of Appeals reviewed, considered, and rejected this constitutional argument on the merits and held that the trial court did not err by refusing to instruct the jury that it could not punish Philip Morris for harm that its conduct may have caused to non-parties in awarding punitive damages.

Following this second decision by the Oregon Court of Appeals, the Oregon Supreme Court accepted the case for review. Its review was limited to two questions: (1) whether a defendant is entitled to have the jury instructed "that punitive damages cannot be imposed for alleged harm to non-parties;" and (2) whether the punitive damages award against

Philip Morris was unconstitutionally excessive. *Williams v. Philip Morris USA*, 127 P.3d 1165, 1171 (Or. 2006) (*Williams II*).[2] The Oregon Supreme Court held that the instruction proposed by Philip Morris was incorrect to the extent it would have prohibited the jury from punishing Philip Morris for harm to third parties. *Id.* at 1176.[3] At no time did the Oregon Supreme Court—or any other Oregon court reviewing this case—indicate that there might be a state law procedural ground barring further review of whether the jury's consideration of harm to third parties violated Philip Morris's constitutional rights. Instead, each time the Oregon courts reviewed the case prior to this Court's 2006 decision, they reviewed the merits of—and rejected—Philip Morris's argument that it was improper for the trial court to refuse to instruct the jury that it could not punish Philip Morris for, among other things, harm it allegedly inflicted on non-parties.

Following the Oregon Supreme Court's initial decision, this Court granted *certiorari* to consider

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[2] The Oregon Supreme Court, in *Williams II*, declined to consider additional issues that it held had not been preserved by Philip Morris on appeal. 127 P.3d at 1171. It did not, however, indicate that Philip Morris had waived its right to challenge the constitutionality of the trial court's refusal to instruct the jury that it could not punish Philip Morris for harm to non-parties.

[3] The Oregon Supreme Court also evaluated the propriety of the punitive damages award itself and held that it was not excessive. *See id.* at 1176-82.

two questions: (1) whether Oregon had unconstitutionally permitted Philip Morris to be punished for harming nonparty victims; and (2) whether Oregon in effect had disregarded the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm. *Philip Morris*, 127 S. Ct. at 1062. The Court answered the first question in the affirmative, holding that the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Id.* at 1063. The Court explained that due process "requires States to provide assurances that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused to strangers." *Id.* at 1064. This Court clarified that juries cannot punish for harm caused to non-parties even if the alleged harm was produced by the same or similar conduct—thereby rejecting the distinction the Oregon Supreme Court had relied upon in finding that *State Farm* did not require reversal. *Id.* at 1065.[4] Further, this Court held that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk" that juries may be considering harm to others in seeking to punish a party—which is forbidden—rather than

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[4] The Oregon Supreme Court, in *Williams II*, stated that this Court's decision in *State Farm* did not require reversal of the punitive damages award because that case only prohibited juries from considering harm to third parties arising from *dissimilar* conduct. 127 P.3d at 1175-76.

considering such harm "under the rubric of reprehensibility"—which is permissible. 127 S.Ct. at 1065. It remanded the case and directed the Oregon Supreme Court to "apply the standard set forth" in the Court's decision. *Id.*[5]

On remand, the Oregon Supreme Court framed its task as "apply[ing] the constitutional standard set by the Supreme Court in [its] consideration of the sole issue raised by Philip Morris, *viz.*, whether the trial court erred in refusing to give [Philip Morris's] proposed jury instruction []." *Williams III*, 176 P.3d at 1260. Because the Oregon Supreme Court found that Philip Morris's proposed jury instruction did not completely and correctly state Oregon law on issues wholly distinct from the due process issue before it, it reaffirmed its prior ruling without considering the due process issues as directed by this Court. *Id.* at 1263-64.

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[5] Because application of the constitutional standard the Court laid out had the potential to lead to a new trial or remittitur of the punitive damages award, the Court did not answer the second question—whether the punitive damages award was unconstitutionally excessive. *Philip Morris*, 127 S.Ct. at 1065.

SUMMARY OF THE ARGUMENT

The Court's prior decision in this case instructed the Oregon Supreme Court on remand to "apply the [constitutional] standard" announced in this Court's opinion. 127 S.Ct. at 1065. Rather than follow this Court's explicit directions, the Oregon Supreme Court instead applied a novel state law procedural rule—never before applied in the nine years of appellate litigation in this case—as a basis for reaffirming its prior decision. The Oregon Supreme Court's blatant refusal to consider this Court's mandate to review the violation of Philip Morris's constitutional rights should not be tolerated. This Court should reject the Oregon Supreme Court's attempt to use a state law procedural rule that is neither firmly established nor regularly followed to avoid applying the due process standard previously enunciated by this Court by reversing the punitive damages award against Philip Morris and ordering a new trial.

Allowing the Oregon Supreme Court's decision to stand would provide a road map to other lower courts—especially state courts applying state law—on how to avoid decisions from this Court with which they disagree. Moreover, the Oregon Supreme Court's decision to wait until this late stage of the litigation to invoke a state law procedural rule in order to avoid reviewing the federal constitutional issues in this case, as directed, wastes the limited resources of not only the parties and the Oregon

courts, but of this Court as well. To prevent such an unnecessary waste of those precious resources, this Court should act to make clear that once issues are certified for review and decided by this Court, lower courts must follow the mandate and directions of this Court. In this case, that requires reversing the punitive damages award against Philip Morris and ordering a new trial.

ARGUMENT

I. THIS COURT SHOULD NOT ALLOW THE OREGON SUPREME COURT TO IGNORE THIS COURT'S DIRECTIVE.

This Court's prior ruling could not have been clearer—the due process clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially, strangers to the litigation." *Philip Morris*, 127 S. Ct. at 1063. The Court also made clear that the Due Process Clause "requires *States* to provide assurances that juries are not asking the wrong question," and in the process punishing defendants for harm to those strangers. *Id.* at 1064 (emphasis added). The Oregon Supreme Court ignored these instructions and refused to address the constitutional deficiencies in the jury instructions given in this case. The Oregon Supreme Court tried to justify its actions through the application of a post-hoc procedural mechanism—not raised by the Oregon courts in the previous nine years of

litigation. This Court should not tolerate such a blatant disregard for its mandate. Rather, given the continued violation of the petitioner's due process rights throughout this litigation, including following the remand from this Court, the punitive damages award against Philip Morris should be reversed, and a new trial should be ordered.

A. The Oregon Supreme Court Should Be Required To Apply This Court's Previous Decision.

The last time this case was before this Court, the Court addressed the issue of whether or not the petitioner's due process rights were violated when the jury was instructed that it could consider potential harm to non-parties as part of its punitive damages calculus. The issue was certified to this Court following the Oregon Supreme Court's determination that such an instruction was proper and did not violate the petitioner's due process rights. *Williams II*, 127 P.3d at 1176.[6] Prior to certifying the issue to this Court, neither the Oregon

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[6] The first time this case was before the Oregon Supreme Court, that court evaluated the merits of Philip Morris's due process claim without reference to whether state procedural issues barred consideration of the federal due process claim. *See Williams III*, 176 P.3d at 1259 (Oregon Supreme Court characterized its first holding as ruling on the merits of the "federal requirements of due process law"). It was only after this Court reversed the Oregon Supreme Court's erroneous holding on Philip Morris's constitutional claims that this new independent state law ground was raised as a bar to consideration of petitioner's claim of error.

Supreme Court, nor the Oregon Court of Appeals (which ruled on the merits of this issue twice), indicated that there were any independent state law grounds for avoiding the due process issue presented to this Court. Rather, the Oregon Supreme Court considered and rejected Philip Morris's argument that federal due process law prohibits a jury from punishing a defendant for the impact of its alleged misconduct on non-parties. *Williams II*, 127 P.3d at 1176 (noting that Philip Morris's position did not "correctly state federal due process law"). The Oregon Supreme Court did not indicate that there was any independent state law procedural rule that prevented it from ruling on the federal due process issue.[7] Instead, the Oregon Supreme Court based its holding on the ground that due process law *does* allow juries to consider harm to non-parties resulting from alleged misconduct similar to that at issue in the case before it. *Id.* It was only after this

[7] Indeed, under Oregon law, courts traditionally decide questions of state law in the first instance in order to avoid deciding federal constitutional issues unnecessarily. *See, e.g., Sate v. Moylett*, 836 P.2d 1329, 1333 (Or. 1992) (describing it as "axiomatic" that courts should resolve issues first on a "subconstitutional level"); *State v. Kennedy*, 666 P.2d 1316, 1318 (Or. 1983) (discussing the "often repeated" rule that "all questions of state law be considered and disposed of before reaching a claim that [the] state's laws fall short of a standard imposed by the federal constitution on all states"). Thus, under Oregon law, any state law procedural rules that would obviate the need to review federal constitutional issues—such as the one the Oregon Supreme Court applied on remand—should have been raised in the first instance, *before* the federal constitutional issues were decided by the Oregon courts and then by this Court.

Court rejected that holding—ruling that the failure to instruct the jury that it could not punish Philip Morris for alleged harm to non-parties violated Philip Morris's due process rights—that the Oregon Supreme Court first applied a purported independent state law ground for avoiding the constitutional issue. This Court should reverse and order a new trial to make clear to lower courts that they cannot belatedly use procedural mechanisms as an end-run around the Constitution and this Court's decisions.

It is a fundamental and bedrock principle of American jurisprudence that the United States Supreme Court is the ultimate arbiter of cases or controversies that come before it. *See Martin v. Hunters Lessee*, 14 U.S. 304 (1816). Accordingly, *all* lower courts must abide by decisions rendered by this Court. *See Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.") (citations omitted). Indeed, the Supreme Court explained over one hundred years ago the requirement that a lower court strictly comply with a Supreme Court mandate:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The

> circuit court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); *see also Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209 (1931) (state courts are bound by the decisions of the United States Supreme Court construing federal law); *Sands v. Morongo Unif. Sch. Dist.*, 809 P.2d 809, 821 (Cal. 1991) (Lucas, J., concurring) ("On issues of federal constitutional law, [] court[s are] bound under the supremacy clause of the United States Constitution by applicable decisions of the United States Supreme Court.") (citations omitted).

The issue before this Court previously—and the issue that this Court decided—was whether States are allowed to permit a jury to punish a defendant for harm to non-parties arising from conduct similar to that at issue in the case before it. The Oregon courts ruled on numerous occasions that this was a proper consideration for the jury, and that issue was certified to this Court for review. It was

only after this Court determined that the jury's consideration of harm to non-parties violated Philip Morris's due process rights that the Oregon Supreme Court raised an obscure state law procedural roadblock as justification for ignoring this Court's mandate and its refusal to apply the due process principles laid out by this Court to the case before it. This extreme exercise of "form over substance" should be rejected, as it risks not only trampling the due process rights of Philip Morris in this case, but also provides lower courts—especially state courts applying state law—with a blueprint for ignoring this Court's mandates when they do not agree with the decisions this Court reaches.

B. This Court Should Act To Ensure That Other Courts Do Not Follow The Oregon Supreme Court's Lead In Disregarding The Directives Of This Court.

Unfortunately, the Oregon Supreme Court's invocation of post-hoc procedural mechanisms as a pretext for sidestepping this Court's mandate is not an isolated incident. In May 2007, this Court vacated the judgment in *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147 (Cal. Ct. App. 2006), and remanded the case to the California Court of Appeal for reconsideration in light of this Court's prior decision in this case. *Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007). On remand, rather than apply this Court's mandate in *Philip Morris* as

directed, the *Buell-Wilson* court followed the Oregon Supreme Court's lead and held that because the jury instructions Ford had proposed "incorrectly and incompletely stated [California] law" on separate, distinct issues, Ford had "forfeited its due process challenge to the punitive damages award." *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 328 (Cal. Ct. App. 2008). In fact, the *Buell-Wilson* court cited the Oregon Supreme Court's action in this case in justifying its own ruling. *Id.* at 337.

Accordingly, the California Court of Appeal did not evaluate whether State procedures had adequately protected Ford against the risk that it would be punished for harm to non-parties, as directed by this Court in *Philip Morris*, 127 S.Ct at 1064. Indeed, the California Court of Appeal went so far as to suggest that Ford's failure to preserve its objections meant that this Court did not have jurisdiction over Ford's due process claim, stating "[t]he United States Supreme Court lacks jurisdiction over federal questions 'not pressed or passed upon in state courts.'" *Buell-Wilson*, 73 Cal. Rptr. 3d at 332.[8] As was the case in the Oregon courts, the California Court of Appeal never suggested during its review that this Court would

[8] In an apparent attempt to backstop its refusal to apply the standard established by this Court in *Philip Morris*, the *Buell-Wilson* court also held that its award of punitive damages—which it reduced from $76 million to $55 million after adjusting plaintiff's non-economic damages—was not unconstitutionally excessive. 73 Cal. Rptr. 3d at 318.

not have jurisdiction to consider Ford's due process claims. Moreover, the suggestion that federal jurisdiction was improper makes no sense given that a number of courts, including this Court, spent time and resources considering Ford's due process claims on the assumption that the claims were ripe for review.[9]

In the past, this Court has not hesitated to reject a lower court's attempt to use independent state law grounds as a pretext for ignoring the Court's mandate. *See, e.g., Yates v. Aiken*, 484 U.S. 211, 218 (1988) (finding that South Carolina was bound to apply the federal relief found by the Court because "it [had already] considered the merits of the federal claim"); *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam) (summarily reversing Alabama state court's refusal to apply this Court's mandate on the basis that the order at issue had state law deficiencies separate and apart from those found unconstitutional by this Court). In *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 295-96 (1964), this Court once again rebuked the Alabama Supreme Court's attempt to use a "nonfederal" rule of court concerning brief

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[9] The California Supreme Court has granted review in *Buell-Wilson*, but has deferred briefing pending this Court's decision in the present case. *Buell-Wilson v. Ford Motor Co.*, 2008 WL 2892940 (Cal. Jul. 9, 2008). This presents yet another layer of wasted time and resources for the court and the parties arising out of a lower court's refusal to abide by the directive handed down by this Court.

construction to prevent this Court from ruling on Alabama's attempt to ouster the NAACP from the State. The Court admonished the Alabama Supreme Court for applying an independent state procedural rule with "pointless severity," describing the Alabama Court's actions as "wholly unacceptable" in light of the NAACP's "serious constitutional claims." *Id.* at 296. The Court went on to state that "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *Id.* at 297.

Similarly, in *Ford v. Georgia*, 498 U.S. 411 (1991), this Court addressed a state court's attempt to bar Supreme Court review through the invocation of an independent state procedural rule. The Georgia Supreme Court had concluded that a petitioner's federal constitutional *Batson* claim was barred by a state procedural rule requiring such claims to be "raised prior to the time the jurors selected to try the case are sworn." *Id.* at 418. This Court reversed, holding that novel procedural requirements that are neither firmly established nor regularly followed in state practice cannot be allowed to prevent Supreme Court review. *Id.* at 423 (holding that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court" and that "only a firmly established and regularly followed state practice" is sufficient to bar review by

the Supreme Court) (internal quotation marks and citations omitted). As discussed in Petitioner's Brief, the independent state law ground cited by the Oregon Supreme Court is neither "firmly established" nor "regularly followed," and therefore is an insufficient ground for refusing to apply the constitutional standard established previously by this Court. *See* Pet. Br. at 35-42.

Just as this Court made clear in *Yates*, *Patterson*, *Flowers*, and *Ford* that it will not allow state courts to use independent state law grounds as a pretext to avoid applying this Court's decisions, it should prohibit the Oregon Supreme Court from denying Philip Morris the constitutional rights to which this Court has already found it is entitled. Indeed, allowing the Oregon Supreme Court to flagrantly disregard the Court's mandate here would give lower courts—especially state courts invoking post-hoc state law procedural rules—an opportunity to manipulate this Court's rulings in the future. Given the serious nature of the violation of petitioner's due process rights, and the Oregon Supreme Court's refusal to uphold those rights or put in place procedures to protect those rights—even after being instructed to do so by this Court—the Court should reverse the punitive damages award and order a new trial.

C. The Oregon Supreme Court Ignored The Fact That This Court Placed The Burden On The States To Ensure That Due Process Rights Are Protected.

In its prior decision, this Court made clear that due process principles forbid the *State* from imposing punitive damages for injuries to non-parties. *See Philip Morris*, 127 S.Ct. at 1063 (noting that "the Constitution's Due Process Clause forbids a *State* to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties"); *see also id.* at 1062 (requiring a "*State* insist[] upon proper standards that will cabin the jury's discretionary authority" so as not to deprive a defendant of its due process rights); *id.* at 1064 (noting that it is "constitutionally important for a *court* to provide assurances that the jury will ask the right question, not the wrong one" in considering punitive damages awards) (emphases added). The Court further held that the State bears responsibility for ensuring the constitutionality of its proceedings, stating that "[a]lthough the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Philip Morris*, 127 S.Ct. at 1065 (emphasis in original).

The Oregon Supreme Court ignored these explicit directions. Instead, it attempted to place the

burden for ensuring the constitutionality of the jury instructions solely on the parties. *See Williams III*, 176 P.3d at 1261 (noting that under Oregon law, it is a requirement "that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give"). Because it found that Philip Morris's proposed jury instruction was incorrect on issues of Oregon law wholly distinct from the due process issue before it—and the issue that this Court ruled upon previously—the Oregon Supreme Court refused to address the due process violation this Court directed it to review. *Id.* at 1263-64.[10] The Oregon Supreme Court, however, failed to even consider whether the State had fulfilled its obligation to put in place a procedure "to cabin the jury's discretionary authority," *Philip Morris*, 127 S.Ct. at 1062, so as not to deprive Philip Morris of its due process rights. Indeed, it is clear that the State did not satisfy due process in this regard. The instructions given allowed the jury to do just the opposite—to consider harm to non-parties when determining what punitive damages to

[10] Philip Morris attempted to take responsibility to ensure that the jury was properly instructed with respect to the due process issues involved by arguing that the jury should be instructed that it could not consider harm to non-parties in assessing punitive damages. This argument was rejected by the trial court—as well as the Oregon Court of Appeals and the Oregon Supreme Court—as being an improper recitation of federal constitutional law. *Williams III*, 176 P.3d at 1259. Under the circumstances, it is hard to imagine what more Philip Morris could have done to insure the trial court gave jury instructions that would protect Philip Morris's constitutional rights.

impose—which this Court ruled is a violation of Philip Morris's due process rights. Thus, the Court should reverse the punitive damages award against Philip Morris, order a new trial, and once again instruct the Oregon Supreme Court to put appropriate procedures in place to insure the jury asks the right questions about punitive damages, not the wrong ones.

II. ALLOWING LOWER COURTS TO INVOKE POST-HOC PROCEDURAL ROADBLOCKS WASTES VALUABLE RESOURCES OF THE COURT AND THE PARTIES.

Apart from the bedrock principle that inferior courts must abide by this Court's mandates, significant policy considerations lead to the same conclusion—this Court should not countenance attempts by state courts to interpose post-hoc, state law procedural roadblocks as a way to avoid implementing decisions rendered by this Court. Specifically, considerations of judicial economy and fairness to the parties weigh in favor of this Court reversing the judgment of the Oregon Supreme Court and ordering a new trial to ensure that these compelling policy considerations are not frustrated by the inappropriate actions of the Oregon Supreme Court. The courts in the United States—including this Court—are faced with dockets that are becoming more and more crowded. Indeed, this Court's caseload "has increased steadily to a current

total of more than 10,000 cases on the docket per Term."[11] In 2006, less than one percent of the cases filed in this Court were argued.[12] These figures reflect the care with which this Court husbands its resources and evidences the need to make sure that cases that make it to the Court are ripe for review. *See, e.g., Schiro v. Indiana*, 493 U.S. 910, 911 (1989) (noting that United States Supreme Court's *certiorari* docket is "so crowded"); *Rogan v. Menino*, 175 F.3d 75, 76 (1st Cir. 1999) (referring to "busy trial courts, struggling to manage crowded dockets").[13]

In light of the ever-increasing demands on the court system, and the courts' limited resources to deal with these demands, it is imperative that attention be given to the important interest of judicial economy. *See Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 390 (1985) (Burger, J., concurring) (stating that "the federal

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[11] *See* THE JUSTICES' CASELOAD, available at *http://www.supremecourtus.gov/about/justicecaseload.pdf.*

[12] *See* 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9, available at *http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf.*

[13] *See also* THE COURT AND CONSTITUTIONAL INTERPRETATION 2, available at *http://www.supremecourtus.gov/about/constitutional.pdf* ("The Justices must exercise considerable discretion in deciding which cases to hear, since more than 10,000 civil and criminal cases are filed in the Supreme Court each year from the various state and federal courts.").

courts have direct interests in ensuring that their resources are used efficiently"); *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991) (noting "[t]he public interest in judicial economy"); *see also Kerr v. U. S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403 (1976) (noting that "particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"); Amy Scott, *Limiting The Jurisdiction Of The Federal Circuit: How Holmes Alters The Landscape Of Patent Cases On Appeal*, 38 GA. L. REV. 429, 433 (Fall 2003) ("The litigation explosion during the post-World War II era caused a backup of cases throughout the judicial system.") (citation omitted). Allowing lower courts to work an end-run around a decision of this Court after that decision has been rendered on the merits is entirely inconsistent with the importance of maintaining judicial economy in an era of over-crowded dockets. Indeed, it needlessly wastes the precious resources of the courts, as well as the time and energy of judges, clerks, attorneys, and parties.

In addition to wasting valuable time and resources, the Oregon Supreme Court's application of a procedural rule at this late stage of the litigation is fundamentally unfair to the parties. Litigants should not be required to go through years of litigation and expense at multiple levels of state court proceedings—culminating in applications to

this Court for relief (for now a third time)—only to have the state high court ignore this Court's clear guidance. Yet, this is precisely the scenario that the Oregon Supreme Court has imposed upon Philip Morris, having waited until *after* this Court ruled before raising a purported independent and adequate state ground for its decision for the *first* time. Allowing a state court to avoid the merits of a federal constitutional question after *it* has teed that question up for this Court runs afoul of the important goal of fundamental fairness to litigants. *See, e.g., Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 57 (7th Cir. 1982) (noting that "one of the goals of the judicial system...is to ensure fundamental fairness to all parties"). The Court should reverse the judgment of the Oregon Supreme Court and order a new trial to reinforce the principle that cases should not be sent to this Court unless they are ripe for review, and that once this Court decides an issue, it is too late to interpose state law procedural barriers to prevent implementing this Court's rulings.

CONCLUSION

For the foregoing reasons, and those presented by the Petitioner, the judgment below should be reversed, and a new trial should be ordered.

Respectfully submitted,

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